

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
v.) CRIMINAL NO. 04-10291-RGS
MAURICE DUBOSE)

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, Maurice Dubose, submits this memorandum to assist the Court in sentencing. For the reasons that follow, defendant submits that the fifteen-year sentence mandated by the Armed Career Criminal Act (ACCA) is inapplicable to him because such a sentence is based on prior convictions not alleged in the indictment, not proven to a jury, and not admitted to at the Rule 11 hearing. The Court should therefore sentence defendant without regard to the statutory minimum using the applicable guideline sentencing range of 77-96 months.

PROCEDURAL HISTORY

On April 5, 2004, Dubose pled guilty to a single count of 18 U.S.C. § 922(g), charging him with being a felon in possession of a firearm. While the indictment alleges that Dubose was a felon at the time of the offense, it does not allege any violent felonies or serious drug offenses. The parties entered into a plea agreement which specified that, under current case law, defendant's prior convictions qualified him for treatment under the ACCA. In the plea agreement, however, Dubose reserved the

right that application of the ACCA violated his Fifth and Sixth Amendments to the U.S. Constitution.

At the plea hearing, Dubose admitted that he was a felon at the time of the possession of the firearm. Dubose did not, however, admit to any specific prior felonies or that he was an Armed Career Criminal.

The Probation Department issued its draft Presentence Report that identified three predicate violent felonies or serious drug offenses and concluded that Dubose is an Armed Career Criminal subject to the fifteen-year mandatory minimum sentence specified in the ACCA. Defendant has objected to the PSR's conclusion that the ACCA applies to him.

ARGUMENT

In United States v. Booker, 125 S. Ct. 738 (2005), the Supreme Court found those provisions of the Federal Sentencing Reform Act of 1984 calling for mandatory Guidelines sentences based on judicial fact-finding incompatible with the Sixth Amendment. Id. at 756. In so doing, however, Booker, like Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 124 S. Ct. 2531 (2004) before it, expressly created an exception from its Sixth Amendment holding for facts of prior conviction, stating, “[a]ny fact (other than a prior conviction) that is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury

verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Booker, 125 S. Ct. at 756 (emphasis added). But this exception is not consistent with the broad reasoning of all three cases, which would seem to require that any fact increasing the sentence range must be either admitted or proven to the jury. See Apprendi, 530 U.S. at 499-523 (Thomas, J., concurring).

In Shepard v. United States, 125 S. Ct. 1254 (2005), decided after Booker, the Court strongly suggested that the prior conviction exception should be viewed narrowly and that Almendarez-Torres v. United States, 523 U.S. 224 (1998), on which the exception is based, may soon be overturned. In section III of Shepard, which only commanded a four-justice plurality, Justice Souter explained that, in addition to relying on the questionable Almendarez-Torres line of cases, the Court's holding limiting the scope of judicial fact-finding regarding prior convictions was required by the "rule of reading statutes to avoid serious risks of unconstitutionality." 125 S. Ct. At 1263. He explained that judicial fact-finding about disputed prior conviction "raises the concern underlying Jones [v. United States, 526 U.S. 227, 243 n.6 (1999)] and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." Id. at 1262. Justice Souter than noted that the dissent charges

the Court's decision "may portend the extension of Apprendi . . . to proof of prior convictions." Id. at 1263 n.5. Justice Souter did nothing to dispel this impression, but instead observes that any risk that a defendant might be prejudiced by proof of prior convictions to the jury could easily be addressed by the defendant waiving the right to have the jury decide that issue.

The fair implication of this plurality opinion is that any judicial fact-finding that strays beyond the "fact of prior conviction," whether that be facts regarding the nature of the offense, probationary status, or release date from custody risks constitutional infirmity. Justice Thomas concurred in the other parts of Shepard but did not join in Part III only because it did not go far enough. Thomas stated that "a majority of the Court now recognizes that Almendarez-Torres, was wrongly decided," and he would find the ACCA unconstitutional as applied to Shepard because it requires an increase in the sentence based on facts (i.e., the prior convictions) not admitted by the defendant or proven to a jury. Shepard, 125 S. Ct. At 1264 (Thomas, J. Concurring).

The four-judge plurality, along with Justice Thomas's now oft-repeated statements that Almendarez-Torres was wrongly decided, dictates that a statutory enhancement based on judicially-found prior convictions is unconstitutional. Cf. United States v. Schlifer, 403 F.3d 849, 852 (7th Cir.

2005) (recognizing that Shepard calls Almendarez-Torres into question but ruling that prior conviction exception applies to guidelines, rather than statutory, enhancement). Instead, where, as here, the prior convictions raise both the maximum sentence (from ten years up to life) and the minimum mandatory sentence, such convictions must be charged in the indictment and proven to the jury beyond a reasonable doubt. In the instant matter, the government's failure to allege the predicate convictions and prove them beyond a reasonable doubt at trial or plea therefore renders the ACCA inapplicable to Dubose.

Although defendant submits that Almendarez-Torres will ultimately be overruled by the Supreme Court, this Court need not overrule Almendarez-Torres in order to find application of the ACCA unconstitutional as to Dubose. This is so because the decision in Almendarez-Torres was limited to the particular facts and the Fifth Amendment claim raised there. In Almendarez-Torres, the defendant admitted in the course of pleading guilty to violating 8 U.S.C. § 1326 that he had been deported pursuant to three earlier felony convictions. 523 U.S. at 227. For this reason, as the Court in Apprendi noted, Almendarez-Torres raised "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact." Apprendi, 530 U.S. at 288. The only issue in Almendarez-Torres, was whether under the Fifth Amendment the prior convictions

should have been charged in the indictment. Since, unlike here, the Sixth Amendment jury trial issue was not factually or legally presented in Almendarez-Torres, the decision must be viewed only as a limited ruling on the Fifth Amendment indictment issue. Thus, Almendarez-Torres does not preclude application of Apprendi's Sixth Amendment ruling to prior convictions.

In sum, this Court should deem the ACCA inapplicable to Dubose and should sentence him without regard to the increased statutory maximum and minimum sentences mandated in it.

CONCLUSION

For the foregoing reasons, this Court should impose a sentence of not greater than the ten-year statutory maximum pursuant to 18 U.S.C. § 922(g) using the advisory guideline sentencing range of 77-96 months with a three-year period of supervised release with whatever conditions the Court deems necessary.

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